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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 379

EVERETT ROBINSON, PETITIONER,

vs.

UNITED STATES OF AMERICA.

No. .....

EVERETT ROBINSON, PETITIONER,

vs.

UNITED STATES OF AMERICA.

No. .....

EVERETT ROBINSON, PETITIONER,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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OCTOBER TERM, 1965

No. .....

EVERETT ROBINSON, PETITIONER,

vs.

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No. .....

EVERETT ROBINSON; PETITIONER,

vs.

UNITED STATES OF AMERICA.

No. .....

EVERETT ROBINSON, PETITIONER,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on May 26, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, infra, p. A5, is reported in ..... F. 2d .....

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 26, 1965, p. A5, infra. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1) and Rule 22 (2). The order granting an extension to file petition for writ of certiorari was granted to July 23, 1965, printed in Appendix B hereto, p. A5.

QUESTIONS PRESENTED

Whether the trial judge should have dismissed the indictments when the statutes under which petitioner is charged are unconstitutional.

Whether petitioner has the right to a Bill of Particulars setting out the elements of the alleged crime.

Whether the indictment charged an offense against the United States and whether the Court had jurisdiction to proceed in petitioner's case.

Whether it is injustice for petitioner to receive a harsher sentence than other defendants for the same offense.

Whether it is injustice for the Court of Appeals to dismiss petitioner's appeal when constitutional and jurisdictional issues were properly and squarely put before the Court of Appeals.

Whether an order staying the date of judgment affects the 10 day appeal notice.

STATUTES INVOLVED

The statutory provisions involved are 18 U.S.C., Section 371; 7 U.S.C. 221, 222 and 15 U.S.C. 50. They are printed in Appendix A, infra, pp. A1-A4.

STATEMENT

How Federal Question Is Presented

The petitioner was charged in three multiple-count indictments with violation of the Packers and Stockyards Act, 7 U.S.C., Section 181, etc., and conspiracy, 18 U.S.C., Section 371. The jurisdiction of the District Court was invoked because the case arises under the Packers and Stockyards Act and conspiracy.

Statement of Case

This case involves the nolo contendere pleas of petitioner on one count of each multiple-count indictment with violation of the Packers and Stockyards Act, 7 U.S.C., Section 181, etc., and conspiracy. Two of the indictments charged the petitioner with willfully and unlawfully making a false entry on a draft which later became a part of the accounts, records and memoranda of a company which was a marketing agency subject to the provisions of the Packers and Stockyards Act of 1921 as amended in violation of 7 U.S.C., Section 222 and 15 U.S.C., Section 50.

The third indictment charged petitioner and another with willfully and unlawfully making a false entry on a draft which became a part of the accounts, records and memoranda of petitioner, a registered dealer subject to the provisions of the Packers and Stockyards Act of 1921 as amended; the indictment further charged that another defendant drew a draft on petitioner's account pursuant

to petitioner's instruction and that the entry on said draft was false and in violation of 7 U.S.C., Section 222, and 15 U.S.C., Section 50.

Motions by petitioner to dismiss the indictments were denied. Petitioner withdrew his plea of not guilty and entered a plea of nolo contendere to one count of each indictment. The Court accepted the pleas and the United States dismissed the remaining counts of the indictments.

On December 13, 1963, petitioner was sentenced to imprisonment for two years on each count (R. 59). Petitioner was granted a stay of the judgment for thirty days from December 13, 1963 (R. 80). On January 9, 1964, motions to arrest judgment and to suspend sentence were filed. On December 13, 1963, the Court delayed the judgment (R. 80) and, therefore, the ten day appeal time would have commenced to run thirty days after December 13, 1963. The notice of appeal was filed January 14, 1964, which was on the same day the Court denied petitioner's motion in arrest of judgment and to suspend the execution of any sentence. The Court below dismissed petitioner's appeal upon the authority of Rule 37 (a) (2) F.R.Cr.P. providing for a ten day notice of appeal after the entry of judgment and upon the authority of *U. S.* v. *Robinson*, 361 U.S. 220, 80 S. Ct. 282 (1960). In the Robinson case, the Court was confronted with an order recognizing the filing of a late appeal. The Court below failed to consider the delay of the judgment ordered by the District Court and relied upon the Robinson case erroneously concluding that the motions in arrest of judgment were not timely filed. The Court below did not consider the merits of the appeal including the constitutional issues before the Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below in the instant case (Appendix B, infra, pp. A5 to A7) is in error when such opinion is based upon the authority of *U. S.* v. *Robinson*, 361 U.S. 220, 80 S. Ct. 282 (1960). The Robinson case does not contain the issue of the District Court delaying the judgment and the motion in arrest of judgment being filed within the time during which the judgment was stayed. The questions presented upon appeal were not considered by the Court even though said appeal was properly before it.

In the Robinson case, the District Court attempted to enlarge the period for taking an appeal. In the instant case, the Court did not attempt to enlarge the period for taking an appeal but set the entry of judgment date to be thirty days from December 13, 1963 (R. 80). The petitioner filed motions to arrest judgment on January 9, 1964. The motions were overruled January 14, 1964. Notice of appeal was filed January 14, 1964.

2. Clearly, the question presented is of sufficient importance for the Supreme Court to review. The actual and practical effect of the dismissal of the appeal will have its consequences on other litigants in other situations. The stay of the judgment to a date in the future should enable petitioner and others to rely upon that future date and file in the interim and ten days thereafter appropriate pleadings.

3. The issues presented to the Court below are of grave constitutional public involvement. A constitutional review of this case will affect those charged with the violations of the Packers and Stockyards Act and those transactions coming within the scope of these acts are multitudinous and severely affect livestock and business procedures.

The Federal District Court and the Court below had squarely presented to them the sufficiency of the indictment and the unconstitutional statutory procedure of this case. The nolo contendere plea of petitioner does not relieve the Courts from the issues of constitutionality and sufficiency of the indictment. These issues involve a substantial commercial segment of our society and frequent business endeavors which may be in violation of these statutes; therefore, the Supreme Court should resolve these issues.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CE 5-3415
Counsel for Petitioner

APPENDIX A—STATUTES

Chapter 19—Conspiracy

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

General Provisions

§ 221. Accounts and records of business; punishment for failure to keep

Every packer or any live poultry dealer or handler, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept,

and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than $5,000, or imprisoned not more than three years, or both. Aug. 15, 1921, c. 64, § 401, 42 Stat. 168; Aug. 15, 1921, c. 64, § 503, as added Aug. 14, 1935, c. 532, 49 Stat. 649.

§ 222. Federal Trade Commission powers adopted for enforcement of chapter

For the efficient execution of the provisions of this chapter, and in order to provide information for the use of Congress, the provisions (including penalties) of sections 46 and 48-50 of Title 15, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this chapter and to any person subject to the provisions of this chapter, whether or not a corporation. The Secretary, in person or by such agents as he may designate, may prosecute any inquiry necessary to his duties under this chapter in any part of the United States, Aug. 15, 1921, c. 64, § 402, 42 Stat. 168; Aug. 15, 1921, c. 64, § 503, as added Aug. 14, 1935, c. 532, 49 Stat. 649.

§ 50. Offenses and penalties

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under sections 41-46 and 47-58 of this title, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to said sections, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by sections 41-46 and 47-58 of this title to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the corporation has its principal office or in any district in which it

shall do business. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court. Sept. 26, 1914, c. 311, § 10, 38 Stat. 723; June 25, 1948, c. 646, § 1. 62 Stat. 909.

APPENDIX B—OPINIONS IN JUDGMENTS BELOW

United States Court of Appeals

TENTH CIRCUIT

MAY TERM, 1965.

EVERETT ROBINSON, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 7746
EVERETT ROBINSON, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 7747
EVERETT ROBINSON, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 7748

Appeals from the United States District Court for the District of Kansas.

(Filed United States Court of Appeals, Tenth Circuit, May 26, 1965. Robert C. Cartwright, Clerk.)

Jack Dalton, Jetmore, Kansas, (Tom Harley and George E. Grist, Wichita, Kansas, Van Smith, Jetmore, Kansas, and Tom Harkness, Ness City, Kansas, with him on the brief), for Appellant.

Newell A. George, U.S. Attorney, District of Kansas, (Melvin M. Gradert, Assistant U.S. Attorney, Wichita, Kansas, with him on the brief), for Appellee.

Before PICKETT and HILL, United States Circuit Judges, and CHRISTENSEN, United States District Judge.

PICKETT, Circuit Judge.

The appellant Robinson was charged in three multiple-count indictments with violation of the Packers' and Stockyards Act, 7 U.S.C. §181, et seq., and conspiracy. Motions to dismiss the indictments were denied. Thereafter Robinson, through his attorneys, requested permission to withdraw his plea of not guilty to one count of each indictment and enter a plea of nolo contendere to such counts. With the consent of the United States, the Court accepted the pleas and the United States Attorney dismissed the remaining counts of the indictments. On December 13, 1963, Robinson was sentenced to imprisonment for a period of two years on each of the counts to which nolo contendere pleas were entered, to run concurrently. On January 9, 1964 motions in arrest of judgment and to suspend sentences were filed. These motions were denied on January 14, 1964 and notices of appeal were filed on the same day.

Rule 37(a)(2) F.R.Cr.P. provides that a defendant in a criminal case may take an appeal from a judgment or order by the filing of a notice of appeal within 10 days after the entry of the judgment and order. ". . .(I)f a motion for new trial or in arrest of judgment has been made within the 10 day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion." See Lujan v. United States, 10 Cir., 204 F.2d 171; Smith v. United States, 10 Cir., 273 F.2d 462, cert. denied 363 U.S. 846. The motions in arrest of judg-

ment were not filed within 10 days after entry of the judgments, therefore the judgments and sentences became final when notice of appeal was not taken within the 10 day period. The law is settled that the taking of an appeal within the time prescribed by the rules is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220.. See, also, Fennell v. United States, 10 Cir., 339 F.2d 920; Peterkin v. United States, 10 Cir., 311 F.2d 219; Yates v. United States, 10 Cir., 308 F.2d 737; Wilkinson v. United States, 10 Cir., 278 F.2d 604, cert. denied 363 U.S. 829; Hixon v. United States, 10 Cir., 268 F.2d 667.

The appeals are DISMISSED.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 379

EVERETT ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Three multiple-count indictments, returned in the United States District Court for the District of Kansas, charged petitioner with substantive violations of, and a conspiracy to violate, the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) (Tr. 2, 30, 48). Motions to dismiss the indictments (Tr. 9, 35, 54) were denied (Tr. 14, 41, 59). Thereafter petitioner requested permission to withdraw his plea of not guilty and to enter a plea of nolo contendere as to

one count of each indictment (Tr. 68, 71, 73).[1] The court accepted the pleas of nolo contendere and the United States Attorney dismissed the remaining counts of the indictments (Tr. 69, 71, 73). On December 13, 1963, petitioner was given concurrent sentences of imprisonment for two years (Tr. 15, 41, 59). At this time a thirty-day stay of execution as to each sentence was granted at petitioner's request to enable him "to get his affairs in order" (Tr. 80, 15, 42, 60). Copies of the Judgment and Commitment were filed on December 17, 1963 (Tr. 16, 42, 60). On January 9, 1964, petitioner filed motions in arrest of judgment and to suspend sentences (Tr. 16, 42-43, 60-61). On January 14, 1964 (after a hearing at which one of petitioner's three retained counsel presented a lengthy argument, and produced witnesses, in a plea for probation, Tr. 92 *et seq.*), the motions were denied (Tr. 112). Notices of appeal were filed on the same day (Tr. 25, 45, 62). On May 26, 1965, the appeals were dismissed as untimely filed (R. 3, 4). Petitioner seeks review of that ruling.[2]

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[1] The counts to which the pleas of nolo contendere were entered charged that petitioner, a registered dealer under the Packers and Stockyards Act, willfully and unlawfully caused false entries to be made in drafts drawn on bank accounts which became part of the records required pursuant to the Act, in violation of Section 402 of the Act (7 U.S.C. § 222) and Section 10 of the Federal Trade Commission Act (15 U.S.C. § 50) (Tr. 3, 30, 48).

[2] On June 28, 1965, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including July 23, 1965, and the petition was filed on July 22, 1965.

The 10-day period for taking an appeal, prescribed by Rule 37(a)(2) of the Federal Rules of Criminal Procedure, is mandatory and jurisdictional. *United States* v. *Robinson*, 361 U.S. 220. It cannot be extended even upon a showing (not made here) of excusable neglect. *Id.*, at 230. With respect to judgments filed on December 17, 1963, the motions to arrest judgment, filed on January 9, 1964, were not timely and therefore did not toll the running of the 10-day period under Rule 37(a)(2).[3] Petitioner argues that the trial court, in staying the execution of sentence for thirty days, *delayed* the judgment, and hence that the 10-day period for appeal commenced to run thirty days after the imposition of sentence. There is no merit to this contention. The judgment became final when the judgment of conviction setting forth the sentence was entered. Cf. *Corey* v. *United States*, 375 U.S. 169, at 171. The stay delayed the execution of sentence, not its imposition. *Berman* v. *United States*, 302 U.S. 211, 212. It did not in any way affect the finality of judgment.

Petitioner's contention is completely answered by *Berman* v. *United States*, *supra*, 302 U.S. at 212:

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[3] Since the motions to arrest judgment were filed more than 10 days after judgment, the question does not arise here (a question left open by the decision of this Court in *Lott* v. *United States*, 367 U.S. 421) as to whether Rule 37(a)(2) is modified by Rule 34 so as to make the motions timely only if made within 5 days after determination of guilt. See *Joe Robert Collier* v. *United States*, petition for writ of certiorari pending, No. 331 Misc., this Term.

> * * * Petitioner was convicted and sentenced. Final judgment in a criminal case means sentence. The sentence is the judgment. *Miller* v. *Aderhold*, 288 U.S. 206, 210; *Hill* v. *Wampler*, 298 U.S. 460, 464. Here, the imposition of the sentence was not suspended, but only its execution. The sentence was not vacated. It stood as a final determination of the merits of the criminal charge. To create finality it was necessary that petitioner's conviction should be followed by sentence (*Hill* v. *Wampler*, *supra*) but when so followed the finality of the judgment was not lost because execution was suspended. In criminal cases, as well as civil, the judgment is final for the purpose of appeal "when it terminates the litigation * * * on the merits" and "leaves nothing to be done but to enforce by execution what has been determined." *St. Louis, I. M. & S. R. Co.* v. *Southern Express Co.*, 108 U.S. 24, 28; *United States* v. *Pile*, 130 U.S. 280, 283; *Heike* v. *United States*, 217 U.S. 423, 429.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
Acting Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
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Attorneys.

AUGUST 1965.

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